

DECISION



Wang 119/22
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-206450 **DATE:** August 3, 1982
MATTER OF: Integrity Management International, Inc.

DIGEST:

Protest filed with contracting agency and GAO subsequent to protester's receipt of information furnished in response to Freedom of Information Act request is dismissed as untimely filed where basis of protest was or should have been known prior to receipt of information, but was not made subject of protest within time limit specified by Bid Protest Procedures (4 C.F.R. part 21 (1982)).

Integrity Management International, Inc. (IMI), protests the award of a contract to Military Services, Inc. of Georgia (Military), by the Naval Supply Center (NSC) for the provision of mess attendant services at the Navy Submarine Support Facility, San Diego, California. We dismiss the protest as untimely.

On November 9, 1981, NSC issued the solicitation (No. N00244-82-B-0093) in question. The solicitation contained standard form 33A (March 1969) which, at paragraph 8, contained an outdated provision governing the consideration of late bids. By printing the word "DELETED" across this paragraph, the Navy expressly informed all bidders that this paragraph was not applicable to the solicitation. But the Navy states that it inadvertently omitted from the solicitation the current late bids clause, found in Defense Acquisition Regulation (DAR) § 7-2002.2 (Defense Acquisition Circular No. 76-18, March 12, 1979), which describes the limited conditions permitting consideration of a late bid for the award of a contract.

At the time set for bid opening, December 22, 1981, NSC received 15 bids. IMI's bid was found to be the lowest at that time. On the next day, NSC received a bid submitted by Military for the solicitation. Military's bid had been sent by certified mail and was

postmarked on the fifth day prior to the day set for bid opening. Military's bid was lower than that of IMI. On December 28, 1981, the contracting officer notified all bidders, including IMI, in writing that a late bid had been received from Military and that it would be considered for award under DAR § 7-2002.2, above.

On January 5, 1982, IMI says that it "informed [a buyer at] NSC, San Diego, that there was no late bids clause in this solicitation and, in fact, it had been specifically deleted." In reply (according to the company's May 4 letter to our Office), IMI says the employee then "stated there was [a late bids clause] and would send us a copy of the regulation"--presumably DAR § 7-2002.2, above, in which the late bids clause is found. On this date, IMI says that it also requested from the employee a "copy of Military's envelope to ascertain if they had complied with the supposed late bid DAR."

From the January 5 discussion related by IMI, therefore, it seems reasonably clear that the NSC buyer was of the view that Military's bid could properly be considered based solely on the late bids clause found in DAR § 7-2002.2, above, even though this clause had not been inserted into the solicitation. By contrast, IMI insists (in the company's May 14 letter to our Office) that on January 11, 1982, NSC's contracting officer suggested that the Navy allowed consideration of Military's bid solely on the basis of a late bids clause found "in the solicitation." On January 15, 1982, IMI then filed a request for a copy of Military's bid envelope and a copy of DAR § 7-2002.2, above, under the Freedom of Information Act (FOIA).

IMI says that it received the information it requested of the Navy on February 8 and "immediately filed a written protest back to NSC because there was no substantiation to NSC's claim that there was a late bid clause in the material that they had finally sent to us." Specifically, IMI's February 8 protest to the Navy alleged that Military's bid was nonresponsive and that the "solicitation has no provisions or DARs to allow for a late bid." NSC denied the protest on February 16, 1982; subsequently, on February 18, 1982, IMI filed a formal protest with our Office.

The Navy argues that IMI's protest is untimely filed with our Office because IMI allegedly knew the basis of its present protest in early January 1982 when it was informed by the Navy's December 28 letter that Military's late bid would be considered for award under DAR § 7-2002.2, above. This knowledge, when coupled with IMI's admitted actual knowledge that the solicitation did not contain a late bids clause, should have prompted IMI, in the Navy's view, to have filed a protest with the Navy or our Office not later than 10 working days after that time period (see 4 C.F.R. § 21.2(b)(2) (1982)); however, IMI's protests to the Navy and our Office were filed more than 10 working days after that period.

IMI argues that it was necessary for it to wait until its receipt of copies of documents requested under FOIA before it was able to ascertain that it had a basis for protest. Since IMI did not receive the information it requested until February 8, 1982, it asserts that the subsequent formal protest filed with the Navy on February 8, 1982, was timely.

The Navy has not discussed the contradictory advice its employees allegedly furnished to IMI in separate conversations in January 1982 regarding the actual basis (DAR § 7-2002.2, itself, or the solicitation, itself) for considering Military's late bid. In any event, we need not resolve this alleged discrepancy because we find the protest untimely under either of the dates of the conversations in question.

It seems to us that IMI's January 5 discussion with the Navy should have reasonably put IMI on notice that the Navy was considering Military's bid solely under authority of the late bids clause found in DAR § 7-2002.2, above, rather than on any supposed late bids clause found in the solicitation. Specifically, the buyer allegedly said she would send IMI a copy of the regulation rather than a copy of a page from the solicitation. Therefore, under this view, IMI's present protest--that Military's late bid could not be considered because the solicitation did not contain a late bids clause--could, and should, in our view, have been filed with the Navy, at the latest, not later than 10 working days after January 5 or by January 19, 1982.

Alternatively, if the Navy's contracting officer actually informed IMI on January 11, 1982, that Military's bid was being considered solely on the basis of a late bids clause found in the solicitation, IMI reasonably should have realized it had a basis for protest as of that date. First, this supposed advice contradicted the information allegedly given by the buyer to the company on January 5, 1982, that Military's bid was being considered solely on the basis of DAR § 7-2002.2, above. Second, IMI admittedly knew, as of that date, that "there was no late bids clause in the solicitation." Given these two circumstances, IMI was obligated to file its protest within 10 working days after January 11 (or by January 25), but it did not do so. Moreover, once it had grounds for protest, IMI could not toll the timeliness requirement because of a perceived, erroneous need to obtain additional information under FOIA about a ground of protest of which it was already on notice. Advanced Marine Enterprises, Inc., B-196252.2, February 7, 1980, 80-1 CPD 106.

Since IMI's protest to the contracting agency was not filed in a timely manner, its subsequent protest to GAO is also untimely. See 4 C.F.R. § 21.2(a) (1982).

The protest is dismissed.

J. H. Barclay, Jr.
For Harry R. Van Cleve
Acting General Counsel